In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-276

WALTER TAYLOR, JR. AND A. J. TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in giving a supplemental instruction to the jury which contained an "*Allen* charge" and a request that the jury deliberate further for a specified period of time.

1. After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to hold to involuntary servitude (see 18 U.S.C. 1584), in violation of 18 U.S.C. 371. Petitioner Walter Taylor, Jr., was also convicted of a substantive violation of 18 U.S.C. 1584.

Petitioner Walter Taylor was sentenced to two years' imprisonment and five years' probation, and petitioner A. J. Taylor received a split sentence under 18 U.S.C. 3651 of thirty-five days' imprisonment and the balance of a five-year term on probation. The court of appeals affirmed on May 16, 1975 (Pet. App. A-6), and rehearing was denied on July 7, 1975 (Pet. App. A-5). The petition for a writ of certiorari was not filed until August 22, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the court of appeals properly rejected petitioners' claim, and further review is not warranted.

The supplemental charge, which was patterned after the charge approved in *Allen* v. *United States*, 164 U.S. 492,[1] and which was given in response to

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[1] *Allen* approved supplemental instructions which "were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority" (164 U.S. at 501).

a request by the jury as to the procedure to follow in the event there was not a unanimous decision, is set forth in the opinion of the court of appeals (Pet. App. A-3, n. 3). In pertinent part it was as follows:

> I've had a question from the jury that if we don't have a unanimous decision, what is the procedure. The procedure is, it will be necessary for me to grant what is known as a mistrial, and this whole proceeding will be lost. And I may as well tell you that I'm going to ask you to come back tomorrow. And I think you as jurors should consider that the case must at sometime be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there's no reason to suppose that the case will ever be submitted to the jury, to a jury of more intelligence, more impartial, or more competency to decide it than you, or that more or clearer evidence will be produced on one side or the other.
>
> Now, I ask you to do exact justice as between the government and the defendants. I am not in any way going to try to coerce you into reaching a decision, if you can't agree unanimously. But I do want, if I don't have objections from one side or the other, I would want you to come back tomorrow morning and please try and see if you can't reach an agreement. And you considered it now I guess pretty much for five hours, and that's a pretty long time to discuss the matter. And if within two hours, between 9:30 and 11:30, you are unable to reach an agreement, I will be very happy to discharge you from further duty in the case and declare a mistrial,

> which, of course, will necessitate a trial at some other time. So would you please come back tomorrow morning and try and see if you can conscientiously reach a unanimous verdict. Are you willing to do that, every one of you? (The jury indicated affirmatively.)

The court then asked if there were any objections to the proposed procedure, and neither side objected. Petitioners' counsel said specifically: "I have no objection to the jury retiring for the evening and returning in the morning" (Pet. 9).[2] The court then continued, telling the jury (Pet. App. A-3 to A-4, n. 3):

> * * * I'm going to take your word that you've given me this afternoon that you will not talk to anybody, and resume your deliberations, and I hope that you can reach a decision within the two hour limit. I don't think I'm over burdening you in asking you to try a little harder because I said something to you this morning, and I again repeat it. You will be a great aid to the administration of justice when you agree upon

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[2] The colloquy between the court and counsel was as follows (Pet. App. A-3, n. 3):

> The Court: * * * Now, is there any objection on the part of the government upon that procedure?
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> Mr. Fishkin: No, your Honor.
>
> Mr. Levine: I have no objection to the jury retiring for the evening.
>
> The Court: Pardon me.
>
> Mr. Levine: I have no objection to the jury retiring for the evening and returning in the morning.
>
> * * * * *

> a verdict based upon the law of the elders. And it is upon the utmost concern of the court where the verdict lies, for the government or the defense. All I'm here to do is to give you the law and to see that the law is properly conducted according to the rules of evidence and the rules of procedure. That is my only interest in the case. So I have no axe to grind, but I do like to see cases moved along. But I only want them moved along if the verdict represents the conscientious individual judgment of each juror and is unanimous. So good night, ladies and gentlemen, and I'll see you sometime tomorrow morning.

After the district court had finished speaking to the jury, counsel for petitioners asked if he could "address * * * the record after the jurors leave * * * " (Pet. 11). The court excused the jury from the court room. Counsel thereupon moved for a mistrial "in light of that expression [*i.e.*, the jury's question as to the procedure to be followed if they did not have a unanimous decision] and ask that the jurors not return to deliberate. But, if you want to overrule that motion, I insist that they finish this evening * * * " (*ibid.*). The court denied the motion for mistrial (*ibid.*).

2. Contrary to petitioners' contention that they were not given an opportunity to object to the supplemental charge (Pet. 6), the record shows they were given such an opportunity both when the jury was present and when it had left. Petitioners' counsel at first said he had no objection to the proposal to ex-

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cuse the jury for the evening and to have them return in the morning. After the jury had been excused, counsel for petitioners changed his mind about this procedure. However, at no time did he object to the content of the *Allen* charge or to the proposed limit on deliberation time. Thus, the court of appeals correctly stated (Pet. App. A-4):

> [O]ur review of this asserted error in the Taylors' trial is limited by the "plain error" rule, Fed. R. Crim. P. 52(b), which is to be invoked "only where the error complained of seriously affects the fairness or integrity of the trial * * *."

The district court's instruction was not coercive and therefore did not constitute plain error. The court was careful to abjure any attempt to force the jury to reach a verdict unless such verdict represented the "conscientious individual judgment of each juror" (Pet. App. A-4, n. 3). The court's suggestion of a time limit in this case is most reasonably construed not as coercion but as an assurance to the jurors that they would not have to deliberate for an indefinite period. The court said: "And you considered it now I guess pretty much for five hours, and that's a pretty long time to discuss the matter. And if within two hours * * * you are unable to reach an agreement, I will be very happy to discharge you from further duty in the case and declare a mistrial * * *" (Pet. App. A-3, n. 3). The instruction scrupulously did not indicate the judge's view of the evidence or of the appropriate verdict. Nor did the instruction contain an admonition to the jurors in the minority to

reconsider their views, the aspect of the traditional *Allen* charge found troublesome by some of the courts of appeals. *See, e.g., United States* v. *Thomas*, 449 F.2d 1177, 1181 (C.A.D.C.); *United States* v. *Fioravanti*, 412 F.2d 407, 415-417 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F.2d 930, 933-934 (C.A. 7), certiorari denied, 396 U.S. 1017. Thus, we submit that the court of appeals was correct in stating (Pet. App. A-4, n. 3):

> Having considered all the circumstances surrounding the supplemental charge here, as well as the charge itself, we find that the plain error rule prohibits our taking cognizance of this allegation of error.

Finally, petitioners contend (Pet. 13-15) that the court of appeals' decision conflicts with *Burroughs* v. *United States*, 365 F.2d 431 (C.A. 10), and *Goff* v. *United States*, 446 F. 2d 623 (C.A. 10). In Goff, the supplementary instruction about time limits for deliberation was objected to, and the court therefore did not consider whether it constituted plain error. Thus, *Goff* does not conflict with the instant case. In *Burroughs*, the Tenth Circuit appears to have held an instruction about time limits for deliberation to be plain error, but the court does not appear to have established a *per se* rule. The court analyzed the particular charge involved in the case and concluded: "We think the charge in this case went beyond the permissible limits of the Allen charge as it has been construed and approved by this court" (365 F. 2d

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at 434). The demarcation between permissible and impermissible *Allen* charges is not susceptible to bright line rules; the ultimate question whether a defendant has received a fair trial is a factual one. Thus, *Burroughs* and the instant case represent not a clear conflict of legal principles but different conclusions based on different facts.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

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[3] The development and use of the *Allen* instruction is being reexamined by the courts of appeals. Although no court of appeals has held that the traditional *Allen* charge is *per se* impermissible, several courts of appeals appear to have determined in the exercise of their supervisory power that the traditional form of the instructions should be abandoned in favor of a modified form. See *United States* v. *Fioravanti, supra; United States* v. *Brown, supra; United States* v. *Thomas, supra.* See also *United States* v. *Silvern,* 484 F.2d 879 (C.A. 7); Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases,* 27 F.R.D. 39, 97-98; Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge,* 3 Tex. Tech. L. Rev. 313, 317-319, 327-331 (1972); Note, *The Allen Charge Dilemma,* 10 Amer. Crim. L. Rev. 637, 664 n. 108, (1972); Comment, *Instructing Deadlocked Juries in Light of the Trial of Juan Corona,* 53 Ore. L. Rev. 213, 215-216 (1974). We do not believe that it would be appropriate for this Court to reconsider *Allen* at this time, especially not in the context of this case, which presents only the narrow question whether an alleged error constitutes plain error.

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